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99-5746

Supreme Court, U.S.
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In The

Supreme Court of the United States

LONNIE WEEKS, JR.,

Petitioner,

v.

RONALD J. ANGELONE, Director,
Virginia Department of Corrections,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Is Weeks' claim defaulted and barred from federal collateral review because he failed to "fairly present" it to the Virginia Supreme Court on direct appeal?

2. Is granting relief upon Weeks' claim – which challenges the adequacy of the trial court's discretionary, accurate response to the sentencing jury's question – barred by the "new rule" doctrine and 28 U.S.C. § 2254(d)?

3. Under all the relevant facts surrounding Weeks' penalty-stage proceeding, is there a reasonable likelihood that the jury could have believed it was precluded from considering his mitigation evidence?

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STATEMENT OF THE CASE

A. Weeks' Murder of Trooper Cavazos

Shortly after 12:30 a.m. on February 24, 1993, Virginia State Trooper Jose Cavazos, who was operating a radar check at a cross-over on southbound Interstate 95 in Prince William County, observed a Volkswagen Jetta being driven at a high rate of speed. (App. 120-121, 273-274). Louis Dukes, Jr., was driving the vehicle, while Lonnie Weeks, Jr., sat in the front passenger seat. Cavazos then pursued Dukes' vehicle, which passed another car on the right shoulder. Finally, Cavazos stopped Dukes' automobile at the overpass on the Dale City exit ramp. (App. 274). As far as Cavazos knew, the traffic stop was a routine one. Unfortunately for the trooper, who had only a few minutes to live, the stop was anything but routine for Weeks.

Unbeknownst to Trooper Cavazos, Weeks was on probation in North Carolina for a 1992 drug conviction and had violated the terms of his probation, both by not informing his North Carolina probation officer that he was leaving for Washington, D.C., and by not obtaining her written permission. (App. 121; Oct. 21, 1993, Tr. 25-30). Additionally, the very car that Weeks was traveling in was one that he had stolen from Gene Farmer in Fayetteville, North Carolina, at the end of January, 1993. (App. 273; Oct. 19, 1993, Tr. 260-265). A man named George Mallett, moreover, had been murdered in Fayetteville on January 9, 1993. (App. 273-274; Oct. 20, 1993, Tr. 111-112). Although Weeks had not been involved in Mallett's murder, he had obtained in January, 1993 the Glock 17 pistol used in that murder, knowing that the police

were looking for it and that it was loaded with hollow point ammunition. (App. 114-115, 273-274). Weeks was armed with the loaded pistol on the night of the capital murder.

Thus, when Cavazos stopped his car, Weeks was nervous because he was on probation and knew that the car was stolen. (App. 121). After the trooper looked at Dukes' driver's license and a piece of paper from the glove compartment, Cavazos directed Dukes and then Weeks to get out of their vehicle. In his subsequent confession to the police, Weeks acknowledged that Cavazos was friendly during the encounter. (Oct. 20, 1993, Tr. 35).

As he got out of the car, Weeks took the Glock 17 pistol from underneath the floor mat and held it down by his side. He said he considered throwing the gun over a rail on the overpass of the exit ramp but then, according to his trial testimony, "an evil spirit" entered him. (App. 123). Weeks then shot Trooper Cavazos, whose gun was still strapped in his holster, six times without warning or provocation. (App. 274-275). Two of the shots would have been independently fatal. (App. 295). One fatal wound penetrated the neck, the aorta, the pulmonary artery, and the left lung. (Oct. 19, 1993, Tr. 134-135). The second fatal wound entered the left side of the trooper's chest at the level of his clavicle and caused a "massive hemorrhage" at the axillary artery and vein in Cavazos' left armpit. (*Id.*, Tr. 137). The four remaining shots entered the trooper's forearms and left wrist. (*Id.*, Tr. 166-169).

Within minutes of the shooting, Officer James Virgil of the Prince William County Police Department came upon Weeks and Dukes at a motel located about 1/2 mile

from the exit ramp. (App. 276). The two men, who claimed that they had heard gunshots, consented to remain at the motel and wait for an officer who could speak with them. (App. 277). Later that morning, Special Agent J. K. Roland of the Virginia State Police questioned Weeks in a motel room, while Dukes was questioned in another motel room. Shortly after Roland advised Weeks of his *Miranda* rights, another trooper informed Roland that Dukes had admitted that Weeks had shot Trooper Cavazos. Consequently, at 7:52 a.m. Roland arrested Weeks for the murder. (App. 280). At about 6:00 p.m. on February 24, 1993, Weeks gave the police a full confession. (App. 281-282).

B. Trial Court Proceedings

Weeks then was indicted and prosecuted pursuant to Virginia Code § 18.2-31(6), which makes the "willful, deliberate, and premeditated killing of a law-enforcement officer . . . when such killing is for the purpose of interfering with the performance of his official duties" capital murder. The trial court conducted jury voir dire on October 18, 1993. Upon the parties' agreement, panels of four prospective jurors were questioned, first by the trial judge and then by the Commonwealth's Attorney and defense counsel. Without exception, the trial judge asked the panels, in the event they were to convict Weeks of capital murder, would they "be able to consider voting for a sentence less than death in this matter?" (App. 17, 27, 38, 43, 50, 59). Similarly, the trial court asked each panel member: "Could you consider the imposition of a life sentence as opposed to the death penalty, even though you may have convicted the Defendant of capital

murder? Could you consider life as well as death?" (App. 17-18, 28, 59).

During his questioning of the various jury panels, the Commonwealth's Attorney asked, in substantially similar language, the following questions:

> MR. EBERT: I think all of you understand that the charge of capital murder, the Defendant is charged with a crime that **permits** the imposition of the death penalty. Do you understand that?
>
> JURY PANEL: (Indicating in the affirmative.)
>
> MR. EBERT: In the trial we have what we call a bifurcated proceeding. It means that you will hear evidence as to whether or not the Defendant is guilty or innocent. **If you find that the Defendant is guilty, then you would come back and hear more evidence and determine whether or not you feel the death penalty is appropriate. You understand that?**
>
> JURY PANEL: (Indicating in the affirmative.)
>
> MR. EBERT: Will you be willing to consider **all the evidence** of both aspects of this trial proceeding?
>
> JURY PANEL: (Indicating in the affirmative.)
>
> * * *
>
> MR. EBERT: **[I]f the Defendant were to be convicted there would be two options under the law to which he could be sentenced. One, of course, would be the death penalty and the other would be life imprisonment. Could you fairly consider both of those options?**
>
> JURY PANEL: (Indicating in the affirmative.)

> MR. EBERT: **It would depend upon the evidence and the circumstances and the law as to what penalty you would impose; is that correct?**
>
> JURY PANEL: (Indicating in the affirmative.)

(App. 18-20; Oct. 18, 1993, Tr. 45, emphasis added).

During his own questioning of the venire, defense counsel repeatedly asked the prospective jurors about their willingness to consider any mitigating evidence presented by Weeks. For example, Weeks' attorney conducted the following voir dire of one panel:

> MR. BAKER: The next three questions deal with something called mitigation. I'll define the term. Mitigation is something that lessens the offense. In other words, you have done the offense, but because of these circumstances, you would consider it worthy of a lesser sentence. That's the best way I can define it.
>
> I'll ask if you could consider these factors as matters in mitigation. Do you understand my definition?
>
> (Ms. Rogers and Mr. Dobyns indicated in the affirmative.)
>
> MR. BAKER: Could you consider youth as a factor in mitigation, the Defendant's youth?
>
> (Ms. Rogers and Mr. Dobyns indicated in the affirmative.)
>
> MR. BAKER: Could you consider the fact that he lost his mother and father at an early age as a factor in mitigation?
>
> (Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

> MR. BAKER: Could you consider the fact that he was remorseful as a factor in mitigation; remorse meaning sorry?
>
> (Ms. Rogers and Mr. Dobyns indicated in the affirmative.)

(App. 31-32).

The guilt phase of the trial occurred on October 19-20, 1993. At the outset of the proceeding, Weeks pled guilty to use of a firearm in the commission of the capital murder and a related grand larceny charge and was sentenced to respective prison terms of three years and ten years. At the conclusion of the guilt stage, the jury convicted Weeks of capital murder, and the case proceeded to the penalty phase of the bifurcated trial.

The penalty phase was conducted on October 21-22, 1993. During his opening statement, the Commonwealth's Attorney reminded the jurors that they had taken an oath, "and you are to consider certain evidence now, as well as the evidence that you've heard, and determine what is the appropriate sentence. . . . " (App. 85). The prosecutor concluded: "I would ask you, after you've heard **all of the evidence, to weigh it carefully** [and] I would ask you to sentence him to death in accordance with law and in accordance with the evidence." (Oct. 21, 1993, Tr. 11-12, emphasis added).

In the defense's opening statement, Weeks' attorney stated that "what the jury must now do is decide the two alternatives that are open to them. That is, one, death; and the other, life in prison." (App. 86). Defense counsel then alluded to the mitigating evidence about Weeks' background that he intended to present and stated that

"you as the jury **will have to consider this.**" (App. 87, emphasis added). Defense counsel concluded: "[T]his is an individual that you will see the human side of him. . . . [T]he question will be, should he pay the ultimate price for this, or is there enough goodness in this individual that this jury could find mercy in its heart to spare his life." (App. 87).

Thereafter, in addition to reintroducing its evidence from the guilt phase, the Commonwealth offered Weeks' 1992 North Carolina drug conviction order, as well as the testimony of his probation officer, who described the numerous acts committed by Weeks that had violated the terms of his probation. (Oct. 21, 1993, Tr. 25-31). Additionally, Linda Cavazos, the widow of Trooper Cavazos, and three Virginia State Police officers testified about the victim and the impact of his murder upon his family and fellow officers. (App. 94-104; Oct. 21, 1993, Tr. 56-61).

The defense then presented the testimony of ten witnesses in mitigation, including Weeks himself. Weeks' testimony consumed 110 pages of the trial transcript, most of which dealt with his upbringing, the circumstances under which he came to Virginia, and the events culminating in Trooper Cavazos' murder. Among other things, Weeks, who was 20 years old at the time of the murder, testified that his grandmother, Evelyn Leach, started raising him while he was in the eighth grade. (App. 106-107). Mrs. Leach provided him with a good home and guidance, and up until the time he graduated from high school, Weeks regularly attended church. (App. 110). Weeks also was a starting player on his high school basketball team and received college scholarship offers. (App. 109).

Mrs. Leach and Trina Hammond, Weeks' half-sister, also testified about his upbringing. (App. 156-161, 166-175). These witnesses described Weeks' adverse reaction to the death of his father and his abandonment by his mother when he was a teenager. (App. 156-161, 166-168). Seven other friends of Weeks' also testified about his upbringing and the efforts they made to help him. (App. 130-150, 162-166).

Weeks and several other defense witnesses testified that, after he graduated from high school, he quit going to church and began a downward spiral that led to his arrest and conviction in 1992 for conspiracy to possess marijuana with intent to distribute. Finally, Weeks described the circumstances that led up to Trooper Cavazos stopping his car. Weeks admitted that he had shot the trooper several times but claimed that he had panicked. (App. 121-123).

The trial court then instructed the jury. Instruction No. 2, to which Weeks raised no objection, stated, in pertinent part:

> You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or imprisonment for life. . . . Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:
>
> 1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
>
> 2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.
>
> **If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment. . . .**
>
> If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment. . . .

(App. 192-193, emphasis added).

Additionally, the trial court granted Weeks' Instruction B-1, which explicated the concept of mitigating evidence thusly:

> Mitigation evidence is not evidence offered as an excuse for the crime of which you have found defendant guilty. Rather, it is any evidence which in fairness may serve as a basis for a sentence less than death. **The law requires your consideration of more than the bare facts of the crime.**

> Mitigating circumstances may include, but not be limited to, any facts relating to defendant's age, character, education, environment, life and background, or any aspect of the crime itself which might be considered extenuating or tend to reduce his moral culpability or make him less deserving of the extreme punishment of death.
>
> **You must consider a mitigating circumstance** if you find there is evidence to support it. The weight which you accord a particular mitigating circumstance is a matter of your judgment.

(App. 195, emphasis added).[1]

During the Commonwealth's closing argument, the Commonwealth's Attorney discussed such matters as the circumstances surrounding Weeks' slaying of Trooper Cavazos, along with the mitigating evidence that the defense had presented. (App. 200-207). Among other things, the Commonwealth's Attorney argued:

> [Weeks] killed Jose Cavazos because it was good for him to do it. It would help him, or so he thought, and no other reason.
>
> And it is because of that, that the death penalty is the only appropriate sentence in this case.

---

[1] Weeks agreed to the deletion of the last sentence of this instruction, as originally submitted, which stated: "However, you may not refuse to consider the evidence that has been presented in mitigation." (App. 189).

> If he had gotten on the witness stand and told you the truth, perhaps a life sentence would be appropriate.
>
> * * *
>
> Why couldn't he tell us the truth yesterday? If he wants mercy, and his lawyers are going to use that word, shouldn't he be truthful with us first?
>
> * * *
>
> I ask you to impose the most serious penalty that the law allows, for this most serious of crimes.

(App. 202, 203, 207).

In his own closing argument, defense counsel similarly discussed the events culminating in Trooper Cavazos' death as well as the aggravating and mitigating evidence that the parties had adduced. (App. 207-213). In part, defense counsel argued:

> I stand before you . . . to argue that my client should receive a penalty of less than death, because that's what this trial has boiled down to; life or death.
>
> * * *
>
> [W]hen you decide on your sentence in this case, you do have two alternatives; life or death.
>
> I would ask you to consider that for eighteen years this was a pretty decent person, that he stayed out of trouble for that long, under difficult circumstances.
>
> * * *

> The Commonwealth had alluded to you, in order to . . . fix this defendant's sentence of death, you must find two things, and that is that. . . .

(App. 207, 211, 212).

At this point, the Commonwealth's Attorney interposed an objection that under state law the Commonwealth had to prove only one of the statutory aggravating predicates, not both, in order for the jury to consider the death penalty. *See* Virginia Code § 19.2-264.4. Defense counsel acknowledged his error and resumed his argument:

> I made a mistake, there are two factors you can consider, either one of which would justify a death sentence [*i.e.*, Weeks' "future dangerousness" or the "vileness" of the murder.] **Now, you could still find that he meets both of these criterias [*sic*], and not sentence him to death.**
>
> **I believe you will read that in the instructions.**
>
> * * *
>
> [T]he issue is whether you should sentence this defendant, Lonnie Weeks, Jr., to death, or you feel from the evidence, and the Judge has given you an instruction with respect to what you can consider, that he deserves the other alternative, which is life.

(App. 212-213, emphasis added).

In rebuttal, the Commonwealth's Attorney specifically acknowledged: "We have the death penalty and **you don't have to impose it, but all of you have taken an oath that you can consider both options.**" (App. 214,

emphasis added). The Commonwealth's Attorney also argued:

> You've heard the evidence and you folks are going to have to determine what the appropriate punishment is in this case.
>
> * * *
>
> I would say to you folks that if you are going to have the death penalty, this case is the type of case that it is designed for.
>
> * * *
>
> [Weeks] got on the stand yesterday, folks, and he told you certain things for one reason and one reason alone, and that was to mitigate the punishment that you are entitled to impose on him, that you've sworn to consider, under the law.
>
> **I say to you if you believe what he said on the stand yesterday, sentence him to life.** If you don't, and you believe that the type of person that he is, that he was trying to serve himself, I say sentence him to death, but you folks be the judge of that.

(App. 214-215, emphasis added).

The jury began its penalty deliberations at approximately 10:40 a.m. on October 22, 1993. (App. 219). At approximately noon, the jury submitted a question concerning Weeks' parole eligibility, to which the trial judge, over Weeks' objection, responded: "You should impose such punishment as you feel is just under the evidence, and within the instructions of the Court. You are not to concern yourself with what may happen afterwards." (App. 219).

After taking a one-hour luncheon recess from approximately 12:40 p.m. to 1:40 p.m., the jury resumed its deliberations. (App. 220-222). At approximately 3:15 p.m., the jury submitted the following question:

> If we believe that Lonnie Weeks, Jr., is guilty of at least 1 of the alternatives, then is it our duty as a jury to *issue* the death penalty? or must we *decide* (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the rule? Please clarify.

(App. 217, emphasis in original). During a colloquy with opposing counsel concerning its possible reply to the jury, the trial court stated that it did not believe it could answer the question any more clearly than to refer to Instruction No. 2. Defense counsel objected and requested that the court inform the jury that even if it found one or both aggravating factors beyond a reasonable doubt, it still could impose a life sentence. (App. 223). The trial court, however, provided this written response to the jury: "See second paragraph of Instruction #2 (Beginning with 'If you find from. . . .')." (App. 217). The trial judge reasoned that this particular paragraph of Instruction No. 2 did "exactly what" Weeks' proffered answer did and "answers their precise question. I think they just have to be drawn to that paragraph to find their answer." (App. 224).

Without asking any follow-up questions and after deliberating for more than two additional hours, the jury returned with a verdict at 5:31 p.m. (App. 224-225). Although the trial court had submitted to the jury both statutory aggravating factors, the jury, which was given

five possible verdict forms, based its death sentence solely upon a finding of the "vileness" circumstance. (App. 196-198, 228). The jury's verdict, moreover, specifically stated that the jury had "considered the evidence in mitigation of the offense. . . . " (App. 228). The trial court then polled the members of the jury, all of whom assented to the verdict. (App. 225-226).

Pursuant to Virginia Code § 19.2-264.5, the trial court conducted a post-trial hearing on January 13, 1994, and imposed the death sentence. The trial court entered final judgment on January 14, 1994.

C. Direct Appeal

On direct appeal to the Supreme Court of Virginia, Weeks' brief included as Assignment of Error 41: "The trial court erred in refusing to give the jury defendant's proposed instruction 'C1' or to otherwise fully and properly instruct the jury regarding their option to give effect to mitigating evidence by sentencing the defendant to life in prison even if they found one or all of the statutory 'aggravating factors' beyond a reasonable doubt, in light of the nature of the offense charged, the evidence adduced at trial and the law applicable thereto." (App. 252). In support of this Assignment, Weeks' only argument on brief was that "instruction C1 was a correct statement of the law under *Penry [v. Lynaugh*, 492 U.S. 302 (1989)], was not needlessly redundant, and was materially vital to the defendant; it should therefore have been given to the jury by the court." (App. 267-268).

Weeks' Assignment of Error 44 stated: "The trial court erred in refusing, in response to a specific jury

request for clarification, to specifically instruct the jury that if they found one or more aggravating factors beyond a reasonable doubt, they could sentence the defendant to life in prison or to death." (App. 253). Weeks' entire "argument" in support of this assigned error was as follows: "The defendant relies on the argument set forth under the *41st Assigned Error, supra,* in response to the question presented on this error. This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, §§ 8, 9 and 11 of the Constitution of Virginia." (App. 270).

On November 4, 1994, the state court affirmed Weeks' capital murder conviction and death sentence. *Weeks v. Commonwealth*, 450 S.E.2d 379 (Va. 1994). In response to the Commonwealth's argument in its brief that Weeks had defaulted Assignment of Error 44 by offering no supporting argument, the state court noted that Weeks had "effectively present[ed] no argument in support of five . . . alleged errors (Nos. 16, 34, 44, 45, and 46). . . . We have considered these so-called arguments and find no merit in any of the five." (App. 275). Later in its opinion, the state court remarked that Weeks had advanced "a number of miscellaneous issues dealing with evidence, jury instructions, and inquiries by the jury during its deliberations. We have considered all the arguments in support of those issues and conclude that none has any merit." (App. 292).

The Virginia Supreme Court denied Weeks' petition for rehearing on January 13, 1995. This Court denied certiorari review on October 2, 1995. *Weeks v. Virginia*, 516 U.S. 829 (1995).

D. State Collateral Proceedings

On December 4, 1995, Weeks filed his state habeas corpus petition in the Virginia Supreme Court, but raised no claim attacking the trial court's response to the jury's penalty phase question. On March 15, 1996, the state court dismissed the petition as jurisdictionally barred, because it was untimely filed under Virginia Code § 8.01-654.1 and Virginia Supreme Court Rule 5:7A(a). On June 7, 1996, the Virginia Supreme Court denied Weeks' petition for rehearing.

E. Federal Collateral Proceedings

Weeks next filed a federal habeas petition on February 7, 1997, in the United States District Court for the Eastern District of Virginia. For the first time, Weeks presented a specific claim that the trial court, in response to the jury's question, had been obligated by the Constitution to do something more than refer the jury to the specific portion of the penalty-stage instructions that set forth the circumstances under which it could impose a death sentence. (App. 297-302). On April 1, 1998, the district court dismissed Weeks' petition and ruled, in relevant part, that the Virginia Supreme Court's disposition of Weeks' "claim" on direct appeal challenging the trial court's response to the jury's inquiry was reasonable within the meaning of 28 U.S.C. § 2254(d) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Weeks v. Angelone*, 4 F. Supp. 2d 497, 536 (E.D. Va. 1998).[2]

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[2] In his Report and Recommendation dated July 30, 1997, the Magistrate Judge had reached a similar conclusion. 4

On May 10, 1999, the United States Court of Appeals for the Fourth Circuit unanimously affirmed the district court's denial of collateral relief. *Weeks v. Angelone*, 176 F.3d 249 (4th Cir. 1999). With respect to Weeks' current claim, the Fourth Circuit first ruled that the Supreme Court of Virginia's two references in its appellate opinion about the lack of "merit" in Weeks' claims warranted the conclusion that the state court had not rejected Weeks' claim as procedurally defaulted. (App. 340-342). The Court of Appeals, however, concluded that under § 2254(d), as well as under a *de novo* standard of review, Weeks was not entitled to federal habeas relief. (App. 342-346 and 346 n.5). The Fourth Circuit reasoned that here, much as in *Buchanan v. Angelone*, 522 U.S. 269 (1998), the circumstances of Weeks' trial demonstrated "that no reasonable juror would have understood [the penalty-stage instructions] to preclude the consideration of mitigating evidence even upon a finding of an aggravating factor." (App. 345). On June 4, 1999, the Court of Appeals, without dissent, denied Weeks' petition for rehearing and suggestion for rehearing en banc.

On July 7, 1999, pursuant to Virginia Code § 53.1-232.1, the state trial court set Weeks' execution for September 1, 1999. On August 16, 1999, Weeks filed his certiorari petition and stay application in this Court. On September 1, 1999, this Court entered an order staying

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F. Supp. 2d at 536. In its final opinion dismissing Weeks' petition, the district court overruled Weeks' objection to the Magistrate Judge's recommendation on this issue. *Id.* The Magistrate Judge had rejected the respondent's argument that the claim was defaulted because it had not been fairly presented to the Virginia Supreme Court on direct appeal.

Weeks' execution and granting the petition, limited to Question 1, *i.e.*, whether in response to the jury's question the trial judge had been obligated by the Constitution to do more than refer the jury to the specific portion of the penalty-stage instructions dealing with its sentencing alternatives. (App. 378).

SUMMARY OF ARGUMENT

Consistent with the principles of comity and finality that inform federal collateral review of presumptively valid state court judgments, state prisoners must fairly present their federal constitutional claims to the state courts before bringing them to federal court. A prisoner's failure to do so constitutes a procedural default that normally is preclusive of federal collateral relief.

Weeks' sole challenge on direct appeal to the trial judge's answer to the jury's question about its sentencing alternatives was a one-sentence assignment of error supported only by a one-sentence "argument" on the discrete (and now abandoned) issue of the facial validity of the penalty phase jury charge. Consequently, because Weeks did not brief his present Eighth Amendment claim on direct appeal, and the Supreme Court of Virginia necessarily did not reach the merits of that claim, Weeks' procedural default bars federal review.

It is axiomatic, moreover, that a trial judge enjoys broad discretion in determining how to respond to a jury's request for supplemental instructions. When Weeks' case became final in 1995, numerous courts had held that a trial court does not abuse its discretion by

referring the jury to accurate instructions that it already has been given. And, this Court certainly never has held that a judge's reliance upon an original, valid jury charge in responding to a jury's question is unconstitutional.

Under the "new rule" doctrine established in *Teague v. Lane*, 489 U.S. 288 (1989), as well as under 28 U.S.C. § 2254(d), it is clear that, as of the time Weeks' case became final, a state court reasonably could have rejected his Eighth Amendment claim. Indeed, a reasonable jurist could have found that Weeks' present claim merely challenged a trial judge's discretionary response to a procedural incident at trial and did not even implicate the Constitution.

Finally, under the "reasonable likelihood" test promulgated in *Boyde v. California*, 494 U.S. 370 (1991), Weeks plainly suffered no constitutional violation. The voir dire, the opening statements and closing arguments of counsel, and Weeks' lengthy presentation of mitigating evidence all repeatedly reinforced the twin principles that the jury was not obligated to impose a death sentence upon the mere finding of a statutory aggravator and that the jury was obliged to consider all the evidence, including Weeks' mitigating evidence, before deciding his punishment. When the jury asked a question during the penalty phase deliberations seeking additional information about the sentencing process, the trial judge properly referred it to the specific portion of the standard Virginia instruction – the same instruction that this Court upheld in *Buchanan v. Angelone*, 522 U.S. 269 (1998) – that answered the jury's inquiry. The fact that the jury deliberated more than two additional hours, did not ask any follow-up questions, based its verdict solely on the "vileness" circumstance

while rejecting the "future dangerousness" predicate, and stated in its verdict that it had considered the evidence in mitigation of the offense shows that there is no possibility, much less a reasonable likelihood, that Weeks' jury believed itself precluded from considering his mitigation evidence.

ARGUMENT

I. WEEKS' CONSTITUTIONAL CLAIM IS DEFAULTED BECAUSE HE NEVER FAIRLY PRESENTED IT IN STATE COURT.

Two closely-related principles of federal habeas corpus jurisprudence – exhaustion and procedural default – intersect at the very threshold of collateral review of state court judgments and, in part, establish the boundaries within which such federal review may proceed. The record in this case demonstrates that Weeks did not fairly present his constitutional claim on direct appeal to the Supreme Court of Virginia, thereby resulting in a procedural default. *See Smith v. Murray*, 477 U.S. 527, 533-537 (1986). Weeks has exhausted his present claim, but only because of his preclusive default.[3] *See Teague v. Lane*, 489 U.S. 288, 297-299 (1989).

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[3] As the prevailing party, respondent was not required to cross-petition in order to challenge the Fourth Circuit's rejection of his default defense. *See Jones v. United States*, 119 S.Ct. 2090, 2105-2106 (1999). Respondent affirmatively asserted the default defense in his brief in opposition to Weeks' certiorari petition. (Br. Op. at 4 n.2).

This Court consistently has required state prisoners fairly to present the substance of their federal constitutional claim to the state courts, in order to exhaust their state court remedies. *See Picard v. Connor*, 404 U.S. 270, 275 (1971). Merely citing "book and verse on the federal constitution" does not afford a state court "a fair opportunity" to consider the defendant's federal constitutional claim. *Id.* at 276, 278. Thus, this Court concluded in *Connor* that the defendant's presentation on direct appeal of certain state law and Fifth Amendment claims did not exhaust his related equal protection claim even though he had "presented all the facts" relevant to the latter issue. *Id.* at 277.

Since *Connor*, this Court regularly has applied this "fair presentation" test in assessing exhaustion issues. For example, in *Anderson v. Harless*, 459 U.S. 4 (1982), the Court stated that exhaustion requires more than "that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." *Id.* at 5 (citation omitted). Thus, this Court held that the petitioner had not exhausted his federal constitutional burden-shifting claim, when on direct appeal he relied only upon state law and the state appellate court had analyzed his claim in similar state law terms. *Id.* at 6-7.

More recently, in *Duncan v. Henry*, 513 U.S. 364 (1995) (*per curiam*), this Court ruled that Henry's argument on direct appeal challenging the admission of certain evidence as a "miscarriage of justice" under the California Constitution did not exhaust his federal habeas due process challenge to the same evidence. In holding that the

prisoner's direct appeal argument did not satisfy *Connor*'s "fair presentation" requirement, the Court noted that in the state court he expressly had raised a "due process" claim on a separate issue and that the state appellate court had analyzed his evidentiary claim solely in non-constitutional terms. *Id.* at 366.

A review of the claim Weeks presented to the Virginia Supreme Court on direct appeal establishes that he did not fairly advance his present constitutional claim on direct appeal. Indeed, he did not present the claim **at all**, fairly or otherwise.

Weeks no longer contests the facial adequacy of the penalty phase jury charge; instead, his argument addresses solely the trial court's response to the jury's question about its sentencing options. (Pet. Br. at 19-22). Yet, on direct appeal, the **sole** claim relevant to these matters that Weeks briefed was that the trial court had erred in denying his proposed instruction C-1, thereby failing to instruct the jury that it could give effect to the mitigating evidence and impose a life sentence even if it found one or both statutory aggravators. Weeks never briefed any claim in the Virginia Supreme Court regarding the constitutionality of the trial court's response to the jury's later question.

A review of Assignments of Error 41 and 44 confirms these points. Weeks did brief an argument in support of Assignment of Error 41 that challenged the facial validity of the penalty-phase jury instructions. (App. 267-268). In sharp contrast, Weeks offered **no** argument to support his Assignment of Error 44, other than to adopt and incorporate by reference his prior argument addressing Assignment of Error 41. (App. 270). Thus, the only "argument"

that Weeks briefed in the Virginia Supreme Court in support of Assignment of Error 44 was one that he now has abandoned.[4]

Only if the mere filing of Assignment of Error 44, by itself, could be deemed a fair presentation of his present claim would there be any basis for concluding that Weeks had preserved the claim for federal review. Relevant state law, however, plainly dictates the opposite conclusion. The Virginia Supreme Court's Rules 5:17(c) and 5:27 require an opening brief to include both "Assignments of Error . . . list[ing] the specific errors . . . upon which the appellant **intends to rely**" and "[t]he principles of law, **the argument**, and the authorities **relating to each assignment of error.**" (Emphasis added). Rule 5:17(c) also requires an appellant to list "Questions Presented" separately, that is, "the questions upon which the appellant **intends to submit argument**. . . . "[5] (Emphasis added). The purpose of an assignment of error in Virginia " 'is to point out the errors with reasonable certainty in order to direct [the appellate] court and opposing counsel to the points on which appellant **intends to ask** a reversal of the judgment, and to limit **discussion to these points**.' " *Yeatts v. Murray*, 455 S.E.2d 18, 21 (Va. 1995) (emphasis added).

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[4] He had no choice but to abandon it because, as will be demonstrated, this Court's subsequent decision in *Buchanan v. Angelone*, 522 U.S. 269 (1998), rejected the very same claim.

[5] These provisions are much like this Court's Rule 24.1, which, in paragraphs (a) and (i), requires an appellant to include in his brief the "questions presented for review" and the "argument," respectively.

It is rudimentary Virginia law, moreover, that an assignment of error, unaccompanied by a legal argument, will not be addressed on appeal. *See, e.g., Stockton v. Commonwealth*, 402 S.E.2d 196, 210 (Va.), *cert. denied*, 502 U.S. 902 (1991); *Savino v. Commonwealth*, 391 S.E.2d 276, 283 n.4 (Va.), *cert. denied*, 498 U.S. 882 (1990). Indeed, in Weeks' very own direct appeal, the Virginia Supreme Court similarly declined to review ten assignments of error that he had not briefed. (App. 275).

It is true that, after noting that Weeks had "effectively present[ed] no argument in support of five" additional assignments of error, including Assignment of Error 44, the state court then remarked: "We have considered these **so-called arguments** and find no merit in any of the five." (App. 275, emphasis added). This statement, however, did not signal the Supreme Court of Virginia's disregard of Weeks' procedural default as to Assignment of Error 44. Even if the state court's reference to the lack of "merit" in Assignment of Error 44 were deemed a rejection of a legal argument, such a ruling logically could have referred only to Weeks' now-abandoned challenge to the validity of the initial jury charge, the sole argument he briefed in support of this assignment of error.

The state court's later statement that Weeks had raised "a number of miscellaneous issues dealing with, [in part,] inquiries by the jury during its deliberations. . . . and that none has any merit" does not alter this conclusion. (App. 292). Significantly, the Virginia Supreme Court stated it had "considered all the arguments in support of those issues" in concluding that they lacked

merit. (*Id.*). Again, inasmuch as Weeks offered no "argument" in his entire brief that the trial court's response to the jury's question was constitutionally deficient, the state court's finding of "no merit" could not have referred to Weeks' present claim.

In sum, this Court may reach the merits of Weeks' claim only if it is prepared to hold that a one-sentence assignment of error, accompanied only by a one-sentence reference to a separate issue, amounted to a "fair presentation" of Weeks' present constitutional claim and that the Virginia Supreme Court thereby had a "fair opportunity" to address this phantom claim. Because this Court's prior decisions do not permit such an evisceration of the exhaustion and default doctrines, this Court should conclude that Weeks' claim is barred.

II. WEEKS' CLAIM, IF ACCEPTED, WOULD CONSTITUTE AN IMPERMISSIBLE "NEW RULE," AND RELIEF LIKEWISE IS BARRED UNDER 28 U.S.C. § 2254(d).

In assessing the reviewability of Weeks' claim under the "new rule" doctrine, it is critical to bear in mind exactly what Weeks does, and does **not**, argue in this Court. First, there is no claim that Weeks' right to present mitigating evidence was unconstitutionally restricted; his brief is replete with a description of the mitigating evidence that he presented. (Pet. Br. at 3-10). Indeed, Weeks aptly states that the "story of [his] life was told at sentencing." (Pet. Br. at 3). Second, this case does not involve an erroneous or even ambiguous jury instruction that

might have unconstitutionally restricted the jury's consideration of the mitigating evidence or "affirmatively misled [it] regarding its role in the sentencing process." *See Romano v. Oklahoma*, 512 U.S. 1, 9 (1994).[6] Finally, Weeks does not assert, nor could he, that the trial court's response to the jury's question misstated the law. At no point during the trial did the jury **ever** receive misinformation concerning the nature of the penalty proceeding or its role in sentencing Weeks. *See Jones v. United States*, 119 S.Ct. 2090, 2098-2099 (1999).

Thus, the **sole** argument before this Court is that Weeks suffered an Eighth Amendment violation as a result of the trial court's decision to answer the jury's question by directing it to review an instruction that accurately explicated its sentencing options and that this Court expressly upheld in *Buchanan*. If ever a claim amounted to a non-cognizable "new rule," Weeks' claim is it.

This Court **never** has held that a trial judge acted unconstitutionally in answering a jury's question by referring it to the original (and valid) instructions, much less committed constitutional error under circumstances even remotely equivalent to those in the present case.

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[6] In the Fourth Circuit, Weeks expressly conceded that in *Buchanan v. Angelone* this Court upheld "a capital sentencing instruction almost identical to the one used by Weeks' jury. . . ." (App. 324). Weeks also referred to Instruction No. 2 and the remainder of the jury charge as "a facially constitutional instruction," "constitutionally-sufficient," and "technically flawless." (App. 323, 325, 326). In his certiorari petition, moreover, Weeks stated that "pattern instruction #2 presented a simple decisional tree that ordinary jurors ought to be able to follow. . . ." (Pet. at 6).

Numerous courts of appeals, moreover, repeatedly have held that a trial court has substantial discretion in determining the extent or nature of any response to a jury's request for supplemental instructions and, even more to the point, have held that a trial judge may direct the jury to re-read the original jury instructions if those instructions accurately address the matter alluded to in the jury's question.

In *Teague v. Lane*, this Court held that new federal constitutional rules cannot be announced or applied on federal habeas review unless either of two narrow exceptions exists. The Court stated that "a case announces a new rule if the result was not **dictated** by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301 (emphasis in original). Consistent with principles of comity and finality, the "new rule" doctrine "validates reasonable, good-faith interpretations of existing precedents made by state courts even if they are shown to be contrary to later decisions." *Butler v. McKellar*, 494 U.S. 407, 414 (1990); *see also O'Dell v. Netherland*, 521 U.S. 151, 166 (1997); *Saffle v. Parks*, 494 U.S. 484, 488 (1990). So long as the result " 'was susceptible to debate among reasonable minds' " at the time the prisoner's conviction became final, a federal habeas court may not grant relief merely because it disagrees with the result reached by the state court. *Graham v. Collins*, 506 U.S. 461, 476 (1993).

In resolving "the determinative question [as to] whether reasonable jurists" who "survey[ed] the legal landscape" as it existed at the time the prisoner's case became final would have been obligated to accept his claim, *Graham*, 506 U.S. at 468, 477, this Court has relied upon federal and state authority adverse to the prisoner's

position as a basis for invoking *Teague*. *See, e.g., O'Dell*, 521 U.S. at 166 n.3; *Lambrix v. Singletary*, 520 U.S. 518, 534-538 (1997); *Caspari v. Bohlen*, 510 U.S. 383, 393-395 (1994); *Parks*, 494 U.S. at 490-491, 494; *Butler*, 494 U.S. at 415. *See also Goeke v. Branch*, 514 U.S. 115, 118-119 (1995) (prisoner's failure to identify "existing or well-settled authority" demonstrated that *Teague* barred review of claim challenging dismissal of appeal based on his failure to appear at sentencing). The Court also has relied upon decisions that were against the weight of authority, as well as dissenting opinions in its own earlier cases, to hold that *Teague* barred review of a federal habeas claim.

Thus, in *Sawyer v. Smith*, 497 U.S. 227 (1990), the fact that the Court's "earlier Eighth Amendment cases lent general support to the conclusion reached in *Caldwell" v. Mississippi*, 472 U.S. 320 (1985), did not mean that *Caldwell* was not a "new rule" under *Teague*. 497 U.S. at 236. *See also Parks*, 494 U.S. at 491 (*Teague* barred review of claim that certain mitigating evidence had been wrongly disallowed; even if this Court's prior decisions "inform, or even control or govern, the analysis of [Parks'] claim, it does not follow that they compel the rule that Parks seeks"). Finally, even cases decided after a prisoner's conviction has become final are relevant to the *Teague* inquiry, so long as they were decided adversely to him. *See Bohlen*, 510 U.S. at 395-396; *Gilmore v. Taylor*, 508 U.S. 333, 341-342 (1993); *Graham*, 506 U.S. at 472-475.

By the time Weeks' case became final on October 2, 1995, one court of appeals after another had ruled that a trial court has substantial discretion in responding to a jury's request during its deliberations for supplemental

instructions.[7] More specifically, numerous courts had held that a trial court properly could answer a jury's request for supplemental instructions by referring it to the original charge, so long as that charge correctly set forth the controlling legal principles in the case.

For example, in *United States v. Walther*, 867 F.2d 1334 (11th Cir. 1989), the Eleventh Circuit rejected an argument virtually identical to Weeks'. There, the defendants were convicted of various drug offenses in connection with a "reverse sting" undercover operation. At trial, two of the defendants raised an entrapment defense. After the district court gave the jury instructions on the entrapment defense that previously had been approved by the Eleventh Circuit, the jury interrupted its deliberations to ask a question about the correct allocation of the burden of proof in evaluating the entrapment defense. Over the defense's objection, the district court instructed the jury to review its original instructions. 867 F.2d at 1341.

On appeal, the defendants argued that the district court's failure to give a supplemental entrapment instruction had been reversible error and that the district court

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[7] *See, e.g., United States v. Smith*, 62 F.3d 641, 646 (4th Cir. 1995), *appeal after remand*, 91 F.3d 136 (1996); *United States v. Dorri*, 15 F.3d 888, 892 (9th Cir.), *cert. denied*, 513 U.S. 1004 (1994); *United States v. Stowell*, 947 F.2d 1251, 1257 (5th Cir. 1991); *United States v. Beverly*, 913 F.2d 337, 357 (7th Cir. 1990); *United States v. Laing*, 889 F.2d 281, 290 (D.C. Cir. 1989), *cert. denied sub nom., Martin v. United States*, 494 U.S. 1008 (1990); *United States v. Ladd*, 885 F.2d 954, 961 (1st Cir. 1989); *United States v. Civilli*, 883 F.2d 191, 195 (2d Cir. 1989); *United States v. Walther*, 867 F.2d 1334, 1341 (11th Cir. 1989); *United States v. White*, 794 F.2d 367, 370 (8th Cir. 1986).

improperly had referred the jury "to the very instruction which confused it in the first instance." 867 F.2d at 1341. The Eleventh Circuit, however, upheld the district court's response to the jury:

> The extent and character of supplemental instructions are within the sound discretion of the trial court. The appellants did not object to the original instructions [and on appeal] admitted that the original instructions were proper. Merely having the jury reconsider the correct instructions cannot constitute error nor an abuse of discretion. Accordingly, we hold that the district court did not err nor abuse its discretion in refusing to give a supplemental instruction on the entrapment defense.

867 F.2d at 1341 (citation omitted).

The holding in *Walther* is hardly unique. On the contrary, numerous courts had ruled prior to October of 1995 that trial judges do not abuse their discretion or commit reversible error by referring the jury back to the original jury charge (or simply declining to answer the jury's question). *See, e.g., United States v. Dorri*, 15 F.3d 888 (9th Cir. 1994); *United States v. Keeper*, 977 F.2d 1238, 1242 (8th Cir. 1992); *United States v. Barsanti*, 943 F.2d 428, 437-438 (4th Cir. 1991); *United States v. Atterson*, 926 F.2d 649, 659 (7th Cir. 1991); *United States v. Beverly*, 913 F.2d 337, 357 (7th Cir. 1990); *United States v. Mealy*, 851 F.2d 890, 901-902 (7th Cir. 1988); *United States v. Bailey*, 830 F.2d 156, 157 (11th Cir. 1987); *United States v. White*, 794 F.2d at 370; *United States v. Kimmel*, 777 F.2d 290, 293-294 (5th Cir. 1985); *Davis v. Greer*, 675 F.2d 141, 145-146 (7th Cir.), *cert. denied*, 459 U.S. 975 (1982). *See also United States v. Gibbons*, 968 F.2d 639, 646 (8th Cir. 1992); *United States v.*

Caro, 965 F.2d 1548, 1555 (10th Cir. 1992). And, the rule is no different in cases decided since Weeks' case became final. *See, e.g., United States v. Span*, 170 F.3d 798, 801-802 (7th Cir. 1999); *United States v. Smith*, 104 F.3d 145, 148-149 (8th Cir. 1997); *United States v. Cornillie*, 92 F.3d 1108, 1110 (11th Cir. 1996); *United States v. Mejia*, 82 F.3d 1032, 1037 (11th Cir. 1996).[8]

In sum, Weeks' claim, far from being one that a reasonable jurist in October, 1995 would have been "compelled" to sustain, is one that was (and is) contrary to an unbroken line of authority supporting the adequacy of the trial judge's response to the question posed by Weeks' jury. Indeed, the words of Judge Kozinski in his dissenting opinion in *McDowell v. Calderon*, 130 F.3d 833 (9th Cir. 1997) (*en banc*), *cert. denied*, 523 U.S. 1103 (1998), go to the heart of the "new rule" matter:

> This is, so far as I know, the first case in Anglo-American jurisprudence to hold that a judge erred because he gave a jury instruction that is 100 percent correct. Whatever the merits of this rule – and I agree . . . that there is not much –

[8] Virtually without exception, these courts determined whether the trial court's answer to the jury's question constituted an abuse of discretion. None, then, regarded the adequacy of the trial court's response as implicating the Constitution. As the amicus brief from the Criminal Justice Legal Foundation so persuasively demonstrates (CJLF Br. 18-22), Weeks' claim should be regarded as nothing more than a non-constitutional matter relating to the trial court's handling of a procedural matter, an issue best left to the trial judge's discretion. Because habeas corpus lies only to remedy federal constitutional errors, *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991), Weeks' claim cannot warrant collateral relief.

> such an extraordinary departure from established law may not be applied on collateral review. . . . A glimpse at the legal landscape reveals that never before has any court held that a judge must give a new supplemental instruction rather than refer the jury to the relevant, legally correct instructions already given. Not in 1989; not ever until today.

130 F.3d at 843-844 (Kozinski, J., dissenting).[9]

Even if Weeks somehow could satisfy the "new rule" doctrine, § 2254(d) nevertheless would bar the granting of relief upon his Eighth Amendment claim. This provision of AEDPA precludes federal habeas relief as to any claim adjudicated on the merits by the state court unless, in relevant part, such adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States . . . " The Fourth Circuit, the district court and the Magistrate Judge

[9] In *McDowell*, the Ninth Circuit held that the jury's question showed that 11 jurors "erroneously **believed**" that they could not consider substantial parts of the defendant's mitigation evidence, and this misapprehension thus required the trial judge to do something more than simply refer the jury to the instructions on mitigation. 130 F.3d at 837 (emphasis added). As the Ninth Circuit later made clear, however, in *United States v. Barrigan-Devis*, 133 F.3d 1287 (9th Cir. 1998), *McDowell* hinged on the fact that the jury's question reflected, not mere confusion, but an affirmative misunderstanding of the jury charge. 133 F.3d at 1290. Thus, even if it were correctly decided, *McDowell* would not speak to the issue in the present case. The question posed by Weeks' jury certainly did not manifest an affirmative misapprehension of the sentencing process rather than a mere request for clarification.

unanimously agreed that § 2254(d) bars federal collateral relief on Weeks' claim. (App. 342-346).

Weeks' arguments in this Court have been inconsistent as to what seminal case or line of authority decided by this Court supposedly constitute the "clearly established Federal law" for purposes of § 2254(d)(1).[10] In his certiorari petition, Weeks suggested that the state court's ruling on direct appeal contravened this Court's holding in *Bollenbach v. United States*, 362 U.S. 607, 612-613 (1946). (Pet. at 20-22). On brief, though, Weeks asserts that he "seeks only the obvious application of the pedestrian rule

[10] In a cursory footnote, Weeks suggests that the allegedly "perfunctory manner" of the Supreme Court of Virginia's disposition of his claim on direct appeal justifies *de novo* federal habeas review. (Pet. Br. at 14 n.9). If Weeks is arguing that § 2254(d) is not even applicable to the state court's ruling, no such contention was raised in his petition for certiorari. Weeks did not include as a question presented any argument that the Fourth Circuit erroneously had reviewed his Eighth Amendment claim under § 2254(d). On the contrary, Weeks acknowledged the applicability of § 2254(d) to the present claim by complaining only that the state court's "decision was contrary to and an unreasonable application of this Court's clearly established precedents. . . . " (Pet. at 20). *See Lockhart v. Fretwell*, 506 U.S. 364, 371 n.4 (1993). And, neither in his petition nor his opening brief did Weeks include § 2254(d) under the heading "statutory provisions involved." *See* Rule 24.1(f). Thus, pursuant to Rule 14.1(a), Weeks has not properly preserved any challenge to the applicability of § 2254(d)(1) to this case. *See also Jones v. United States*, 119 S.Ct. 2090, 2104 n.11 (1999); *Lambrix*, 520 U.S. at 527 n.1. *Cf. Trest v. Cain*, 522 U.S. 87, 90 (1997) (prisoner's certiorari petition raising issue of whether district court was **required** to raise sua sponte procedural default issue did not permit review of separate question whether district court was **permitted** to review default sua sponte).

that the sentencer in a capital trial might not deem itself precluded from considering relevant mitigating evidence." (Pet. Br. at 22 n.13).

The latter of these contentions must be rejected, regardless of whether it is viewed in the context of § 2254(d) or the "new rule" doctrine. This Court underscored this point in *Sawyer*, where it found unpersuasive the prisoner's claim that *Caldwell* had been "dictated by the principle of reliability in capital sentencing; the test would be meaningless if applied at this level of generality." 497 U.S. at 236. *See also Gray v. Netherland*, 518 U.S. 152, 169-170 (1996); *Taylor*, 508 U.S. at 343-344. Because the abstract right to present mitigating evidence and to have it considered by the jury simply does not speak with sufficient specificity to the entirely separate matter of the constitutionality of the trial judge's response to the jury's question, this Court's holdings in *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), hardly constitute the relevant "clearly established Federal law" for purposes of § 2254(d)(1). *See also Graham*, 506 U.S. at 902-903; *Sawyer*, 497 U.S. at 236; *Parks*, 494 U.S. at 490-491.

As for *Bollenbach*, if that decision established a constitutional principle that a trial court must respond to a jury's request for supplemental instructions in some prescribed manner and may not simply refer the jury to the original charge, such has been remarkably unrecognized by the courts of appeals.[11] In *Bollenbach*, the defendant

[11] Indeed, some courts have alluded to *Bollenbach* at the very same time that they cited the settled principle that a trial court has broad discretion in determining how to respond to a jury's request for further instructions. *See, e.g., United States v.*

was tried for transporting securities in interstate commerce knowing they had been stolen and for conspiracy to commit that offense. After deliberating seven hours and stating that it was "hopelessly deadlocked," the jury then asked a question that "clearly indicated that the jurors were confused concerning" whether evidence on the substantive charge also constituted proof on the conspiracy count. 326 U.S. at 612. The trial judge responded with an answer that this Court characterized as "palpably erroneous" and "manifest . . . misdirection." *Id.* at 611, 614. This Court concluded that, by its misinformation, the trial court had not discharged its duty to respond to the jury's "explicit . . . difficulties . . . with concrete accuracy." 326 U.S. at 612-613.

Weeks makes no claim that the trial judge's answer to the jury's question was inaccurate or even misleading, but only that it did not go far enough. Inasmuch as *Bollenbach* addressed an entirely separate matter and did "not answer the definitive question" posed by Weeks, *see Lambrix*, 520 U.S. at 528 n.3, then certainly under § 2254(d)(1) a state court reasonably could have regarded *Bollenbach* as readily distinguishable from the present case – even if, unlike in Weeks' case, the claim actually had been raised and *Bollenbach* actually cited to the state court.

Dorri, 15 F.3d at 892; *United States v. Laing*, 889 F.2d at 290; *United States v. Ladd*, 885 F.2d at 961.

III. THE TRIAL COURT PROPERLY ANSWERED THE JURY'S QUESTION ABOUT ITS SENTENCING ALTERNATIVES, AND THERE IS NO REASONABLE LIKELIHOOD THAT THE JURY BELIEVED IT WAS PRECLUDED FROM CONSIDERING THE MITIGATION EVIDENCE.

The record in this case establishes both that the trial court's answer to the jury's question was not unconstitutional and that the jury was not precluded from considering Weeks' mitigation evidence. First, the multitude of courts of appeals opinions analyzing comparable claims under an abuse of discretion standard demonstrate the essentially non-constitutional nature of Weeks' claim. (See pages 35-36 n.8). Moreover, putting aside its entirely dissimilar facts, *Bollenbach* did not invoke the Constitution in holding that the trial judge had not discharged his duty "to give the jury the required guidance by a lucid statement of the relevant legal criteria." 326 U.S. at 612. *Bollenbach* was a direct appeal case "that raised an important question in the administration of federal criminal justice," and merely held that, in light of the trial judge's "bad law," the defendant had been improperly convicted under the federal indictments. 326 U.S. at 609, 614.

The trial judge in Weeks' case, far from acting unconstitutionally, properly exercised his discretion by directing the jury's attention to the very instruction that made clear its obligation to consider the mitigating evidence and its option to impose a life sentence even if it found the existence of one or both aggravating circumstances. In this regard, courts have recognized that typically the most prudent, least risky response that a trial judge can

provide to a jury's inquiry is to have it reread the original, legally accurate, instructions. *See, e.g., United States v. Smith*, 104 F.3d at 149 (trial court did not abuse discretion in referring jury to two instructions in original charge, rather than "risk confusion with another, slightly different instruction"). *See also United States v. Stowell*, 947 F.2d at 1257 (because "[q]uestions posed by a jury are often susceptible of different meanings," trial judge did "nothing wrong in responding in a narrow fashion"). Indeed, it is not unusual for a **defendant** to object to the trial court giving a supplemental instruction, rather than simply referring to the original charge. *See, e.g., United States v. Ellis*, 23 F.3d 1268, 1273-1274 (7th Cir. 1994); *United States v. James*, 998 F.2d 74, 78 (2d Cir. 1993); *United States v. Caro*, 965 F.2d at 1554-1555. And, the substantial risks inherent in a trial court's effort to "improve upon" a concededly valid jury charge may be seen in the recurring challenges to instructions attempting to define the concept of reasonable doubt. *See, e.g., Victor v. Nebraska*, 511 U.S. 1 (1994); *Cage v. Louisiana*, 498 U.S. 39 (1990).

Of course, the trial judge's response to the question posed by Weeks' jury cannot warrant federal collateral relief if, in the end, the jury considered his mitigating evidence before imposing the death sentence. It is abundantly clear, however, that the jury did not disregard Weeks' extensive mitigating evidence. Indeed, it plainly **relied upon such evidence** in finding that he was not a future danger, even though it ultimately concluded that he deserved the death penalty.

In *Boyde v. California*, 494 U.S. 370 (1990), this Court held, as to claims that the jury might have misapplied ambiguous jury instructions, "the proper inquiry . . . is

whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. [A defendant does not make out an Eighth Amendment violation] if there is only a possibility of such an inhibition." 494 U.S. at 380. *See also Jones v. United States*, 119 S.Ct. at 2102-2103; *Estelle v. McGuire*, 502 U.S. 62, 70-75 (1991). The record in this case, when considered against the facts in *Boyde* and *Buchanan*, plainly establishes that there was no possibility, much less a reasonable likelihood, that the jury misapprehended its sentencing alternatives.

From start to finish, the trial judge, prosecutors, and defense counsel repeatedly made clear to the jury that a death sentence under no circumstances was mandatory, that a life sentence always was an option, and that the jury had to consider any mitigating evidence offered by Weeks. For example, during voir dire, the prosecutor first informed the prospective jurors that, in the event Weeks was convicted of capital murder, they would have two sentencing options in the penalty phase and then inquired about their ability fairly to consider all sentencing evidence as well as the two possible punishments. (App. 18-20, 22-24, 29-30, 34-35, 39, 45, 51-53, 60-61). Defense counsel then carefully explained to the venire the concept of mitigation and examined the panels concerning their willingness to consider the defense's mitigating evidence. (App. 21-22, 26, 31-32, 36-37, 41-42, 47-49, 56-58, 63-65).

The parties' opening statements in the penalty phase were of the same stripe. The Commonwealth's Attorney reminded the jurors of the oath that they had taken and

the fact that they would "consider certain evidence now, as well as the evidence that you have heard, and determine what is the appropriate sentence . . . " (App. 85). The prosecutor further stated that after the jurors had "heard **all of the evidence, to weigh it carefully**" and to impose a death sentence "in accordance with law and in accordance with the evidence." (Oct. 21, 1993, Tr. 11-12, emphasis added). In his own opening statement, defense counsel reiterated the sentencing options of death and life imprisonment and then, referring to the mitigating evidence that he would present, stated that "you as the jury **will have to consider this**." (App. 87, emphasis added).

After the Commonwealth introduced its aggravating evidence, the defense, virtually without objection, presented Weeks and nine other witnesses, who described in great detail such matters as Weeks' upbringing, accomplishments and positive behavior until about the time of his high school graduation, his subsequent criminal conduct, and the events surrounding the murder of Trooper Cavazos. (App. 104-175). This evidence, if credited by the jury, tended to show that for most of his life Weeks had overcome socio-economic and personal obstacles and led a productive life, had a relatively minor criminal record, and, perhaps, had acted out of character when he murdered Trooper Cavazos.

In its jury charge, the trial court gave Instruction No. 2, which was virtually identical to the instruction that this Court upheld in *Buchanan*. 522 U.S. at 277 n.4. The instruction informed the jury that, if it unanimously found beyond a reasonable doubt at least one of the statutory aggravators, "then you **may** fix the punishment of the defendant at death or if you believe **from all the**

evidence that the death penalty is not justified, then you **shall** fix the punishment of the defendant at life imprisonment. . . . " (App. 192, emphasis added). The instruction further recited that if the Commonwealth did not prove at least one aggravating predicate beyond a reasonable doubt, then the jury "shall fix the punishment of the defendant at life imprisonment. . . . " (App. 193).

Additionally, the trial court gave an instruction submitted by Weeks that specifically defined, and gave examples of, mitigating evidence. (App. 195). The examples included Weeks' "age, character, education, environment, life and background, or any aspect of the crime itself which might be considered extenuating"; the defense's evidence touched on all of these matters. (*Id.*). The instruction specifically stated, in part: "You **must consider a mitigating circumstance** if you find there is evidence to support it." (*Id.*, emphasis added).

Then, during his closing argument, the Commonwealth's Attorney referred to the mitigating evidence that Weeks had presented and said that if Weeks had testified truthfully in his own behalf, "perhaps a life sentence would be appropriate." (App. 202). The prosecutor also "**ask[ed** the jury] to impose the most serious penalty that the law **allows**, for this most serious of crimes." (App. 207, emphasis added).

Defense counsel's own closing argument again made clear that the jury had to choose between the two sentencing alternatives. Then, Weeks' attorney inadvertently asserted that the prosecution had to prove both aggravating factors before the jury could impose a death sentence; upon the Commonwealth's prompt objection,

defense counsel acknowledged that the prosecution had to prove one aggravating circumstance, not both, in order to permit a death sentence. (App. 212). Of particular significance, defense counsel then stated: "**Now, you could still find that he meets both of these [aggravating] criterias [*sic*], and not sentence him to death. I believe you will read that in the instructions.**" (*Id.*, emphasis added). Finally, defense counsel, alluding to the instruction reciting some of the mitigating evidence that the jury could consider, asked it to impose a life sentence. (App. 213).

In rebuttal, the Commonwealth's Attorney expressly acknowledged that the jury did not "have to impose [the death penalty], but all of you have taken an oath that you can consider both options." (App. 214). And, the prosecutor repeated his earlier statement that if the jury credited Weeks' penalty-phase testimony, then it should "sentence him to life." (App. 215).

After beginning its deliberations at approximately 10:40 a.m. on the second day of the penalty phase, the jury at 3:15 p.m. submitted the following question:

> If we believe that Lonnie Weeks, Jr., is guilty of at least 1 of the alternatives, then is it our duty as a jury to *issue* the death penalty? or must we *decide* (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the rule? Please clarify.

(App. 217, 219, 222, emphasis in original). The trial judge answered the jury's question thusly: "See second paragraph of Instruction #2 (Beginning with 'if you find from. . . . ')." (App. 223). The trial judge reasoned that his response "answers their precise question. I think they just have to be drawn to that paragraph to find their answer." (App. 224).

The jury resumed its deliberations and never submitted any follow-up questions. Instead, **more than two hours later**, it returned with its verdict at 5:31 p.m., and sentenced Weeks to death based solely upon the "vileness" predicate. (App. 224-225). The jury thus specifically rejected "future dangerousness" as a second ground for imposing the death penalty. The jury's verdict, moreover, expressly stated that it "had considered the evidence in mitigation of the offense. . . . " (App. 225). Finally, when polled by the trial judge, all members of the jury assented to the verdict. (App. 225-226).

This Court's decision in *Buchanan* demonstrates that Weeks cannot satisfy the *Boyde* "reasonable likelihood" test. In *Buchanan*, this Court held that the Eighth Amendment had not required the trial court to instruct the capital jury about the concept of mitigating evidence or particular statutory mitigating factors. The Court also concluded that there was no reasonable likelihood under *Boyde* that the jury would have understood the instructions to preclude its consideration of Buchanan's mitigating evidence. 522 U.S. at 279.

In this regard, the Court emphasized "the entire context in which the instructions were given" and concluded that the parties' express references to mitigating evidence in their opening statements and closing arguments in the penalty phase, Buchanan's presentation of seven mitigation witnesses, and the jury's statement in the verdict that it had considered the mitigating evidence demonstrated

that the jury had not disregarded Buchanan's "extensive testimony in making its decision. . . . " 522 U.S. at 270-273, 278-279. Moreover, this Court ruled that an instruction substantially identical to Instruction No. 2 in Weeks' case clearly explained the jury's duty to take into account all the evidence and to consider imposing a life sentence even if it found the existence of one or both of the statutory aggravating circumstances. 522 U.S. at 277 n.4.[12]

All of the circumstances that the Court stressed in *Buchanan* as a basis for rejecting the prisoner's Eighth Amendment claim exist here as well. Indeed, one of the few differences between the two cases is that Weeks' jury specifically was instructed on the concept of mitigating evidence and was expressly directed that it "must consider" the defense's mitigating evidence. (App. 195). Consequently, if no reasonable likelihood existed in *Buchanan* that the jury believed it was precluded from considering

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[12] This Court also has canvassed the trial record in other cases involving allegedly ambiguous jury instructions. In *Boyde* itself, the Court found that a particular mitigating circumstance sufficed to ensure that the jury would consider the defendant's evidence of his background and character, particularly in light of the fact that the defendant had presented (without objection) substantial mitigating evidence and that both the prosecutor's and defense counsel's arguments had confirmed the relevance of the defendant's mitigating evidence. 494 U.S. at 381-386. *See also Jones v. United States*, 119 S.Ct. at 2100-2110 (overall jury charge and verdict forms removed any potential confusion concerning effect of jury's inability to reach unanimous sentence recommendation, and prosecutor's arguments "made absolutely clear" meaning of non-statutory aggravating factors and cured any potential overbreadth or vagueness infirmity.).

the defendant's mitigating evidence, the same conclusion necessarily obtains here as well.

The mere fact that Weeks' jury, unlike the jury in *Buchanan*, asked the trial court a question about the sentencing process and was not given the supplemental instruction Weeks requested certainly is insufficient to demonstrate an Eighth Amendment violation. As the many courts of appeals decisions cited by respondent reflect, juries often ask questions seeking elaboration upon concededly valid instructions. The fact that juries ask such questions shows, not so much their confusion over the original instructions, but their conscientious attempt to discharge their duties. *See United States v. Barr*, 963 F.2d 641, 651 (3rd Cir. 1992); *United States v. Bi-Co Pavers, Inc.*, 741 F.2d 730, 735 (5th Cir. 1984).

Consistent with these principles, there can be no doubt that Weeks' death sentence is constitutional. First, the trial judge discharged any conceivable duty allegedly owed to Weeks under *Bollenbach* by specifically referring the jury to the very instruction that accurately answered its question. The jury, of course, was presumed to follow the court's instructions. *See Jones*, 119 S.Ct. at 2105. The constitutional validity of Weeks' death sentence is reflected by the fact that the jury deliberated for more than two additional hours without asking further questions,[13] and then returned a verdict that expressly stated that it had considered the mitigating evidence. As both

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[13] In *Bollenbach*, this Court emphasized the fact that, after deliberating for seven hours, the jury had rendered a guilty verdict only five minutes after its "inquiry was answered by an untenable legal proposition." 326 U.S. at 614.

the district court and Magistrate Judge aptly noted, it is all the more telling that the jurors, who had promised on voir dire to ask for clarification of any instruction they did not understand, found it unnecessary to ask follow-up questions before reaching their verdict. *See Weeks*, 4 F. Supp. 2d at 536; Magistrate's Report at 110. *See also United States v. Stowell*, 947 F.2d at 1257 (if "jury needed further help it could have asked another question").

The prosecution, moreover, sought the death penalty based on both the "future dangerousness" and "vileness" predicates. The fact that the jury based its death sentence solely upon the "vileness" factor clearly shows not only that it considered, but also that it gave effect to, Weeks' mitigating evidence. Much of Weeks' mitigating evidence had nothing to do with the circumstances surrounding the murder of Trooper Cavazos but, rather, with such matters as his upbringing, positive accomplishments, and criminal record. During closing argument, both parties discussed this mitigating evidence in detail, plainly in an attempt to persuade the jury that Weeks was, or was not, a future danger. (App. 204-216). The only reasonable explanation for the jury's rejection of the "future dangerousness" predicate is that it not only considered his mitigating evidence concerning his background and character, but found it persuasive.[14]

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[14] In his certiorari petition, Weeks did not contest the fact that the jury considered his mitigating evidence, at least for purposes of deciding the future dangerousness issue. (Pet. at 11 n.3, 12 n.4). That being the case, the several decisions of this Court holding that Texas' statutory scheme is constitutional, because its "future dangerousness" special issue provides a jury with the means to consider the defendant's mitigating evidence, likewise support the constitutionality of Weeks' death sentence. *See Johnson v. Texas*, 509 U.S. 350 (1993); *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (plurality opinion); *Jurek v. Texas*, 428 U.S. 262 (1976).

Weeks is the petitioner-appellant in this secondary, disfavored collateral action. *See generally Calderon v. Thompson*, 118 S.Ct. 1489, 1500-1501 (1998). He simply is not entitled to federal habeas relief on the basis of implausible speculation about the reasons for the jury's question or the impact of the trial judge's response on its deliberations. *See Boyde*, 494 U.S. at 380 ("there is a . . . strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation"). *See also Jones*, 119 S.Ct. at 2105 ("Where the effect of [the jury's alleged confusion regarding the consequences of any deadlock is] so uncertain, [the] defendant cannot meet his burden of showing that the error actually affected his substantial rights"); *Romano*, 512 U.S. at 13-14 (inasmuch as jury's knowledge in defendant's second capital murder trial of his death sentence in first trial made it equally plausible that jurors would be more or less inclined to impose additional death sentence, relief "would thus be an exercise in speculation, rather than reasoned judgment"). This Court, then, must reject Weeks' highly improbable conjecture that the jury somehow might have concluded that it could not consider his mitigation evidence.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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ARGUMENT

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), this Court "held that 'just as the State may not by statute preclude the sentencer from considering any mitigating factor, *neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence.*' " *Penry v. Lynaugh*, 492 U.S. 302, 318 (1989) (quoting *Eddings*, 455 U.S. at 113-114) (emphasis added). At the time of Mr. Weeks' trial in 1993, this "sentencer may not refuse to consider mitigation" rule was "not a 'new rule' under *Teague [v. Lane*, 489 U.S. 288 (1989)] because it [was] dictated by *Eddings* and *Lockett [v. Ohio*, 438 U.S. 586 (1978)]." *Id.*, 492 U.S. at 319 (Penry's judgment was final for *Teague* purposes in 1986). In 1993, then, it would have been unreasonable (and contrary to Supreme Court law) for a court to find no " 'risk that the death penalty [was] imposed in spite of factors which may call for a less severe penalty,' " *Penry*, 492 U.S. at 328 (quoting *Lockett*, 438 U.S. at 605, and *Eddings*, 455 U.S. at 119 (O'Connor, J., concurring)), in the face of a sentencer's suggestion that " 'in following the law . . . [it could not] consider,' " *Eddings*, 455 U.S. at 879 (O'Connor, J., concurring) (quoting sentencing judges' comments), mitigating evidence.[1] Trial counsel for Mr.

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[1] As for the Respondent's professed inability to discern "what seminal case or line of authority decided by this Court supposedly constitute [sic] the 'clearly established Federal law' [that satisfies *Teague v. Lane*, 489 U.S. 288 (1989) and Section 2254(d)]," Brief of Respondent, p. 34, the case that Mr. Weeks cited to the trial court and the Virginia Supreme Court – *Penry* – is as good a representative as any of the "pedestrian rule that the sentencer in a capital case may not deem itself precluded from considering relevant mitigating evidence." *See* Brief of Petitioner at 27, n. 13; *see also id.* at 21-22 (line of cases).

Weeks were concerned that the sentencers in his case would *apply* Instruction No. 2 (J.A. 192-93),[2] in a way that violated the *Lockett*, *Eddings*, and *Penry* rule. Counsel stated that "it is not clear to the jury [from Instruction No. 2] that, if they find beyond a reasonable doubt that the aggravating factors have been proved, that they can still choose to sentence the defendant to life in prison." (J.A. 179). To satisfy the Eighth Amendment, said counsel, "the jury has to be instructed that, even if they find the aggravating factors beyond a reasonable doubt, that they have to be instructed that they still can give effect to the evidence in mitigation." (J.A. 178). Counsel told the trial court that the authority for this request was "*Penry v. Linowe* (phonetic) 492 U.S. 302." *Id.*[3] The trial court refused to instruct the jurors according to counsel's *Penry* request, and instead used Instruction No. 2.

The sentencers deliberated, and then returned with a question: if they believed that an aggravating circumstance existed, "then is it our duty to issue the death penalty?"[4] This understanding of their duty would

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[2] This is the instruction later reviewed by this Court in *Buchanan v. Angelone*, 522 U.S. 269, 118 S.Ct. 757 (1998).

[3] The cite for *Penry v. Lynaugh* is 492 U.S 302 (1989). Counsel also explained that the sentencing forms which the jurors had to review and fill out were deficient "when it comes to giving effect to mitigation" (J.A. 179) in that they did "not expressly provide for a sentence of life imprisonment, upon finding beyond a reasonable doubt, on one or both of the aggravating factors." (J.A. 186). Counsel argued that this violated "*Henry v. Linum (sic).*" *Id.*

[4] Respondent argues that a string of occurrences at trial – questions and statements made by the lawyers during voir dire and in closing arguments, the nature and quality of the evidence

plainly violate *Lockett*, *Eddings*, and *Penry*. Counsel asked the trial court accurately to inform the sentencers that even if an aggravating circumstance was found, "they still may impose a life sentence" (J.A. 223), which was the same instruction counsel had earlier requested, based upon *Penry*. The Court refused.

On direct appeal, Mr. Weeks asked that the Virginia Supreme Court reverse the trial court's a.) refusal to instruct the jurors before deliberations that they could give effect to mitigation even if they found an aggravating circumstance, and b.) failure to correct the jurors' mis-impression, revealed during deliberations, that they were required to impose the death penalty upon a finding of aggravation. Respondent argues that Mr. Weeks' claim is defaulted because it was not fairly presented to the Virginia Supreme Court. *See* Brief of Respondent, pp. 21-26. Respondent's arguments ought to be rejected.

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presented, instructions by the trial judge other than the pattern jury instruction upheld in *Buchanan* and relied upon by the Fourth Circuit below in rejecting Mr. Weeks' claim – demonstrate that no sensate jury at Mr. Weeks' trial could possibly have been left sufficiently in the dark to have asked the trial judge the question that Mr. Weeks' jury *did* ask about whether it could or could not consider mitigating evidence after it found an aggravating circumstance. But *all of these* occurrences preceded the jury's asking of the question; the jury undeniably *did* ask the question; and the trial judge's sole answer was to tell the jurors to reread "the second paragraph of Instruction # 2" (J.A. 222) – the pattern instruction involved in *Buchanan*. Everything in Point III of the Brief of Respondent that disregards these realities – and that is almost all of Point III – is quite beside the point.

The following excerpts from the direct appeal record show what Mr. Weeks presented to the Virginia Supreme Court:

ASSIGNMENTS OF ERROR AND
DESIGNATION OF RECORD

. . . .

41. The trial court erred by refusing to give the jury defendant's proposed instruction C1[5] or to otherwise fully and properly instruct the jury regarding their option to give effect to mitigating evidence by sentencing the defendant to life in prison even if they found one or all of the statutory aggravating factors beyond a reasonable doubt . . .

(J.A. 237).

[BRIEF ON DIRECT APPEAL]

41st Assigned Error

In a capital murder case, consideration of the character and record of the individual offender is indispensable in meeting the requirements of the Eighth Amendment. *Woodson v. North Carlina,* [428 U.S. 280 (1976)] *supra.* In *Penry v. Lynaugh* the Supreme Court stated that " . . . it is precisely because the punishment should be directly related to the personal culpability of the defendat [sic] that the jury must

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[5] Proposed instruction C1 reads as follows:

Even if you find that the Commonwealth has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison.

(J.A. 190).

be allowed to consider and *give effect to* mitigation evidence relevant to a defendant's character or record or the circumstances of the offense." 492 U.S. 302, 327-328, 106 L.Ed.2d 256, 109 S.Ct 2943 (1989) (emphasis added). The Court further stated, " . . . in the absence of instructions informing the jury that it could consider *and give effect to mitigating evidence . . . by declining to impose the death penalty,* we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to the evidence in rendering its sentencing decision. *Id.,* (emphasis added), quoting *California v. Brown,* 479 U.S. 538, 545, 93 L.Ed. 2d 934, 101 S.Ct. 837 (1987) (O'Connor, J., concurring).

Instruction C1 was a correct statement of the law under Penry, was not needlessly redundant, and was materially vital to the defendant; it should therefore have been given to the jury by the court.

(J.A. 243-243).

ASSIGNMENTS OF ERROR AND
DESIGNATION OF THE RECORD

44. The trial court erred in refusing, in response to a specific jury request for clarification, to specifically instruct the jury that if they found one or more aggravating factors beyond a reasonable doubt, they could sentence the defendant to life in prison or to death.

(J.A. 238).

[APPELLANTS BRIEF ON DIRECT APPEAL]

44th Assigned Error

[Statement of Facts]

Regarding assigned error 44, during their deliberations in the penalty phase of the trial,

the jury sent out a written question asking the court to "clarify" whether or not they had a "duty" to impose the death penalty if they found one of the aggravating factors beyond a reasonable doubt, or whether they could choose between the death penalty and a life sentence. *Appendix*, 896, 2717-2718. The court refused the defendant's request that the jury be instructed that they could impose a life sentence even if they found one or both of the aggravating factors beyond a reasonable doubt. *Appendix*, 2718-2719, instead instructing them to reread the second paragraph of the finding instruction. *Id.*

(J.A. 265-266).

44th Assigned Error

The defendant relies upon the argument set forth under the *41st Assigned Error, supra*, in response to the question presented on this error.

(J.A. 245).

This error of the court violated the defendant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article 1, sections 8, 9 and 11 of the Constitution of Virginia.

(J.A. 245-246).

In response to these facts, assignments of error, and briefs, the Virginia Supreme Court held as follows:

On appeal, defendant assigns 47 alleged errors committed by the trial court. The defendant has not briefed or argued ten of those assigned errors (Nos. 4, 5, 6, 7, 8, 17, 26, 31, 38, and 39); hence, we will not consider them. *Jenkins v. Commonwealth*, 244 Va. 445, 451, 423 S.E.2d 360, 364 (1992), *cert. denied*, ___ U.S. ___, 113 S.Ct 1862, 123 L.Ed. 2d 483 (1993).[6] In addition, defendant effectively presents no argument in support of five of those alleged errors (Nos. 16, 34, 44, 45, and 46). . . . We have *considered* these so-called arguments and *find no merit* in any of them.

(J.A. 275) (emphasis added).[7]

In conclusion, defendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and inquiries by the jury during its deliberations. *We have considered all the arguments* in support of those issues and conclude that *none has any merit*.

(J.A. 292) (emphasis added).

Thus, Mr. Weeks advised the Virginia Supreme Court that the Eighth Amendment was violated because his capital sentencers believed that they could not consider mitigating circumstances upon finding aggravation. He asked that this constitutional violation be corrected on the basis of *Woodson*, *Penry*, and *Brown*, *supra*, and the Virginia Supreme Court "considered all the arguments in

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[6] The Virginia Supreme Court "defaulted" other issues as well. (J.A. 287, 288).

[7] Respondent urged the Virginia Supreme Court to find that assignment of error 44 was defaulted: "Weeks effectively presents no argument in support of Assignment[ ] of Error . . . 44 . . . Accordingly, he has defaulted on th[is] issue." Brief of the Commonwealth, *Weeks v. Virginia*, No. 940335, p. 16, n.3. The Virginia Supreme Court, by "considering" and "find[ing] no merit" to assignment of error 44, obviously rejected Respondent's default argument. Respondent presented no argument at all regarding assignment of error number 44 on direct appeal.

support of those [and other] issues and conclude[d] that *none has any merit*." (J.A. 292) (emphasis added).[8] There was no procedural default, *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) ("If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal review that might otherwise be available."); *Harris v. Reed*, 489 U.S 255, 262 (1989), and Mr. Weeks' presentation to the Virginia Supreme Court was perfectly sufficient to identify his contention and the specific rule of federal constitutional law on which it rested. *James v. Kentucky*, 466 U.S. 341, 351 (1984) ("inescapable that the defendant sought to invoke the substance of his federal right").

[8] Respondent's argument that on direct appeal Petitioner "did not present the claim at all, fairly or otherwise," Brief of Respondent, p. 23, cannot be reconciled with this record.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the lower court and vacate Petitioner's sentence of death.

Respectfully submitted,

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